SUPREME COURT, U. S.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1974

REGINALD BOYD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Reginald Boyd prays a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on December 5, 1973.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in *United States of America* v. *Regi-*

nald Boyd—No. 72-1964 was entered December 5, 1973 but it not yet officially reported. It is printed in the Appendix to this petition (App. B).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 5, 1973, p. App. 2 infra. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the legal theory of the inclusion of collateral estoppel in the Fifth Amendment double jeopardy clause as specified in *Ashe* v. *Swenson,* 397 U. S. 436 (1970) is applicable to the facts in this case.

2. Whether defendant's conviction by jury for being in violation of Title 26 U. S. C. Section 7201, evasion of wagering taxes on twelve counts was violative of defendant's rights guaranteed under the Fifth Amendment of the United States Constitution prohibiting double jeopardy where defendant was found not guilty of being in violation of Title 26 U. S. C. Section 7206 (1), fraud and false statements on two counts at the same trial on a fourteen count indictment, the same evidence having been produced to support conviction on all counts of said indictment.

3. Whether defendant's conviction by jury for being in violation of Title 26 U. S. C. Section 7201, evasion of wagering taxes on twelve counts of a fourteen count indictment where the trial record is totally void of any evidence that the proceeds of the wagers accepted by others during the periods involved were received by the defen-

dant or that the persons receiving the wagers or contributions were employees or agents of the defendant causing the defendant to be liable for the payment of tax on said wagers was violative of defendant's constitutional right to due process where the trial court failed to adequately instruct the jury as to the element of liability.

STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

26 U. S. C. § 4412. Registration

(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter. Aug. 16, 1954, c. 736, 68A Stat. 527.

28 U. S. C. § 4401. Imposition of tax

(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and pay the tax under this subchapter on all wagers

placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him. Aug. 16, 1954, c. 736, 68A Stat. 525; Sept. 2, 1958. Pub.L. 85-859, Title 1, § 151(a), 72 Stat. 1304.

26 U. S. C. § 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851.

26 U. S. C. § 7206. Fraud and false statements

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

STATEMENT

The jurisdiction of the District was invoked as a result of defendant having been indicted by Grand Jury in the United States District Court for the Northern District of Indiana, Hammond Division, on September 9, 1971, in a fourteen (14) count indictment. Counts I and II alleged violation of Section 7206(1) Title 26 U. S. C., Counts III through XIV alleging violations of Section 7201 Title 26 U. S. C. Trial by jury was had in the United States District Court on the aforementioned offenses and at its conclusion on August 8, 1972, the jury rendered its verdict finding the defendant guilty as charged in counts III through XIV and not guilty as charged in Counts I and II. The aforementioned United States District Court entered judgment and commitment (Appendix infra A, p. App. 1) on October 20, 1972. Thereafter, defendant having complied with all requirements respecting appeal, appealed his conviction on counts III through XIV of said indictment to the United States Court of Appeals for the Seventh Circuit. On December 5, 1973, said United States Court of Appeals entered its order affirming defendant's conviction (Appendix B, p. App. 2 through p. App. 9).

The United States Court of Appeals affirmed defendant's conviction on counts III through XIV in the U. S. District Court, reasoning:

Under the authority of *Dunn* v. *United States,* 284 U. S. 390 (1932) that "inconsistent" verdicts are not reviewable as applied to the facts of this case, "moreover, having found as of the dates charged in Counts I and II that there was none who had received policy wagers on defendant's behalf other than those persons included in his (defendant's) 11-C return, consistency did not necessarily require that jury to reach the same conclusion with re-

spect to the substantially later dates charged in the other two counts." Further the Court of Appeals held that defendant's reliance on *Ashe* v. *Swenson,* 397 U. S. 436 (1970) in support of his argument that the legal theory of collateral estoppel incorporated in the Fifth Amendment's guarantee against double jeopardy the verdict of not guilty as to counts I and II precluded his conviction on Counts III through XIV is misplaced in that "it is clear that *Ashe,* in its double jeopardy context, has reference to separate trials and not to the situation of *Dunn* and the present case, where single indictments and trials were involved.

The Court of Appeals further affirmed defendant's conviction reasoning that there was no basis for distinguishing whether wagers were being accepted on defendant's behalf by agents or employees as specified in Internal Revenue Regulation, Section 44.4401-2[1]. Persons liable for tax or by "independent contractors" on defendant's behalf "If the jury believed that the government witnesses were accepting wagers and forwarding the proceeds to defendant, then those witnesses were defendant's agents for purposes of this statute."

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[1] "Sec. 44.4401-2 Person liable for tax — (a) In general. (1) Every person engaged in the business of accepting wagers with respect to a sports event or a contest is liable for the tax on any such wager accepted by him. Every person who operates a wagering pool or lottery conducted for profit is liable for the tax with respect to any wager or contribution placed in such pool or lottery. To be liable for the tax, it is not necessary that the person engaged in the business of accepting wagers or operating a wagering pool or lottery physically receive the wager or contribution. *Any wager or contribution received by an agent or employee on behalf of such person shall be considered to have been accepted by and placed with such person.*" (emphasis added)

The Court of Appeals was mistaken in concluding that the not guilty verdict as to counts I and II was not inconsistent with the guilty verdict as to Counts III through XIV since the dates charged in counts III through XIV were "substantially later" than the dates charged in counts I and II.

Although the Indictment recites dates the defendant made subscribed and filed the Internal Revenue forms 11-c which were the subject of counts I and II and Internal Revenue forms 730 which were the subject of counts III through XIV and the dates as recited as to counts III through XIV were admittedly later than the dates recited as to counts I and II, the Internal Revenue forms 11-C, Government's Exhibits 13 and 14 and the information alleged to have been false therein related to the fiscal years commencing July 1, 1967, ending June 30, 1968, and commencing June 30, 1968, ending June 30, 1969, respectively. The wagering tax allegedly owed by the defendant was to have been reported on Internal Revenue forms 730 monthly commencing July, 1968, through and including the month of June, 1969, as recited in counts III through XIV of said indictment, and as represented by Government's Exhibits #1 through 12 inclusive. Therefore, the facts in issue alleged to be false in counts II if not counts I and II related directly to the monthly periods which were the subject of counts III through XIV.

The government produced the testimony of numerous witnesses in support of the allegations in counts I through XIV of the indictment. All of these witnesses testified that they had never given any proceeds of wagers accepted by them to the defendant. The government failed to establish by evidence at trial that the defendant received any of the wagering proceeds as alleged in counts III through XIV.

REASONS FOR GRANTING THE WRIT

1. This case presents the important issue of first impression of whether this Court's decision in *Dunn* v. *United States,* 284 U. S. 390 (1932) in its inconsistent verdict concept as it relates to res judicata has been eroded by this court's decision in *Ashe* v. *Swenson,* 397 U. S. 436 (1970) in its concept of collateral estoppel as part of the Fifth Amendment prohibition against double jeopardy so as to preclude defendant's conviction by jury of counts III through XIV while being found not guilty of counts I and II by the same jury of a XIV count indictment when applied to the facts in this case.

The decision of the U. S. Court of Appeals in this case, upon the authority of *Dunn* v. *United States,* supra is directly in conflict with this Court's decision in *Ashe* v. *Swenson* supra. This Court held in *Dunn* v. *United States,* 284 U. S. at 393,

> "consistency in the verdict is not necessary. Each count in an indictment is regarded as if it were a separate indictment (citations omitted). If separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as res judicata of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold."

The defendant does not raise the issue of pleading as res judicata the not guilty verdict as to counts I and II against the guilty verdict as to counts III through XIV.

Defendant does however assert that the facts in this case come within this court's holding in *Ashe* v. *Swenson* even though *Ashe* relates to situations where separate trials are being had. To hold that *Ashe* v. *Swenson* supra in its double jeopardy context should be narrowly confined only to those situations where separate trials are involved would deny a defendant his constitutionally protected rights against double jeopardy by the mere presentment of a multiple count indictment as opposed to the presentment of separate indictments representing each count in the multi-count indictment.

2. The evidence produced at trial was totally insufficient to support the defendant's conviction of counts III through XIV and therefore deprived defendant of due process of law. The jury having found the defendant not guilty of counts I and II necessarily determined that not more than the three persons listed on defendant's internal revenue form 11-c (government's exhibits 13 and 14) received wagers as agents and/or employees on defendant's behalf. Further, the government having failed to produce evidence at trial that the defendant received any of the alleged wagers accepted by the numerous government witnesses who testified concerning their acceptance of wagers failed to establish the element of defendant's liability for the tax allegedly evaded as specified in counts III through XIV. Internal Revenue Regulation 44.4401-2 specifies that a person who operates a wagering pool or lottery conducted for profit is liable for the tax on wagers placed in the wagering pool or lottery even though he does not physically receive the wager or contribution if the wager or contribution is received by an agent or employee on his behalf. In instant case the evidence is that none of the witnesses testifying except John Bolden, who was not

listed as an agent or employee on defendant's Internal Revenue Form 11-C which was the subject of counts I and II, and Irene Marks, who was listed on both 11-c forms were not employees or agents of defendant.

CONCLUSION

Wherefore, this Petitioner respectfully prays the court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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